

LIBRARY

SUPREME COURT, U. S.

Office-Supreme Court, U.S.

FILED

JUL 22 1964

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 86

LOUIS ZEMEL,

Appellant,

v.

**DEAN RUSK, Secretary of State, and ROBERT F.
KENNEDY, Attorney General.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT.**

**APPELLANT'S BRIEF IN OPPOSITION TO
MOTION TO DISMISS OR AFFIRM**

**LEONARD B. BOUDIN,
VICTOR RABINOWITZ,
30 East 42nd Street,
New York, N. Y. 10017,**

**SAMUEL GRUBER,
322 Main Street,
Stamford, Connecticut,**

Attorneys for Appellant.

INDEX

	PAGE
ARGUMENT	1
APPENDIX	6

CITATIONS:

Allen v. Grand Central Aircraft Co., 347 U. S. 535	3
Aptheker v. The Secretary of State, Oct. Term 1963, No. 461, 32 L. W. 4611	4, 5
Bauer v. Acheson, 106 F. Supp. 445 (D. C. Cir., 1952)	4
Fleming v. Nestor, 363 U. S. 603	3
Florida Lime Growers Inc. v. Jacobsen, 362 U. S. 73	4
Idlewild Liquor Corp. v. Epstein, 370 U. S. 713 ..	3
Kennedy v. Mendoza-Martinez, 372 U. S. 144	3
Kent v. Dulles, 357 U. S. 116	4, 5
Lee v. Bickell, 292 U. S. 415	4
Rusk v. Cort, 372 U. S. 144	4
Sterling v. Constantin, 287 U. S. 378	4
William Jameson & Co. v. Morgenthau, 307 U. S. 171	4
Worthy v. United States, 328 F. 2d 386 (C. A. 5, 1964)	4

STATUTES:

Immigration and Nationality Act of 1952, Section 215, 66 Stat. 163, 8 U. S. C. 1185	2, 3, 4
Passport Act of 1926, 44 Stat. 887, 22 U. S. C. Sec. 211(a)	2, 4
28 U. S. C. 2282, 62 Stat. 968	3

IN THE
Supreme Court of the United States

October Term, 1964

No. 86

LOUIS ZEMEL,

Appellant,

v.

DEAN RUSK, Secretary of State, and ROBERT F. KENNEDY,
Attorney General.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT.

**APPELLANT'S BRIEF IN OPPOSITION TO
MOTION TO DISMISS OR AFFIRM**

The Jurisdictional Statement herein, while complying with Rule 15(1)(b)(iv) (Jur. St. p. 2)¹ did not include the three-judge court issue among the "Questions Presented" in view of the disposition of the matter by the court below. Appellees' motion compels fuller treatment.

1. The amended complaint (herein called the complaint) challenged appellees' passport restrictions upon appellant's travel and appellees' threats of criminal prosecution on

¹ "Jur. St." refers to the Jurisdictional Statement; "Motion" refers to the appellees' Motion to Dismiss or Affirm; "R." refers to the record certified by the clerk of the lower court to the Supreme Court; "Comp." refers to the amended complaint.

two independent grounds; (1) they were unauthorized by statute, and (2) the Passport Act of 1926 (herein called the "Passport Act") and § 215 of the Immigration and Nationality Act of 1952 (herein called § 215) relied upon by appellees,

"are unconstitutional both on their face and as applied because (a) on their face, they interfere with plaintiff's rights as set forth in paragraph "14(c)"; and (b) they are construed and applied to prevent travel even in the absence of an actual emergency; and (c) they contain no standards and are therefore an invalid delegation of legislative power." (Comp. ¶ 15, *infra*, p. 10)²

Appellant therefore sought judgment decreeing, *inter alia*, "that the Passport Act of 1926, *supra*, and Section 215 of the Immigration Act of 1952, *supra*, are unconstitutional, and enjoining the defendants from carrying out or enforcing the said statutes as aforesaid" (*infra*, p. 11).

Appellees answered that both statutes authorized the Secretary's regulations, violation of which was punishable under Section 215 (Answer, ¶¶ 9 and 10, R. 22-23). The answer denied that the two statutes were unconstitutional (Answer, ¶¶ 14-16, R. 23).

Two members of the court below held that the statutes authorized the restrictions upon appellant's travel (Jur. St. pp. 1a-23a, 29a-41a). Circuit Judge Smith, dissenting on the merits, agreed that a three-judge court had jurisdiction "for the case sufficiently calls into question the constitutionality of the statutes relied upon by the Executive to sustain the regulations embodying area restrictions on the issuance of passports" (Jur. St. p. 24a). He urged, however, that if the Passport Act were construed to authorize the Secretary's regulations, it created a problem "of invalid delegation" (*ibid.*) and concluded that neither the Passport

² A copy of the complaint is set forth in the Appendix to this brief.

Act nor § 215 afforded "any basis for the area restrictions" (*ibid.*).

2. The court below correctly held that a three-judge court was necessary, since "the constitutional question raised is substantial * * * the complaint at least formally alleges a basis for equitable relief, and * * * the case presented otherwise comes within the requirements of the three-judge statute", *Idlewild Liquor Corp. v. Epstein*, 370 U. S. 713, 715. In view of the injunctive relief sought it cannot be said here, as in *Flemming v. Nestor*, 363 U. S. 603, 607, that the action "did not seek affirmatively to interdict the operation of a statutory scheme".³ A judgment for appellant would necessarily "put the operation of a federal statute under the restraint of an equity decree" (*ibid.*). As the court below said, it "would open up an immediate thoroughfare for unrestricted travel between the United States and Cuba" (Jur. St. p. 6a).

Since the issue of the constitutionality of the statutes was framed and litigated by the parties, it cannot be said that appellant's "real constitutional challenge is * * * to the regulations" (Motion, p. 7). A suitor who challenges the validity of a statute relied upon by the Government to authorize regulatory action properly sues under 28 U. S. C. 2282, even where, alternatively, he argues that the statute does not authorize the regulations, or that the latter are otherwise invalid. This is precisely what occurred in *Allen v. Grand Central Aircraft Co.*, 347 U. S. 535, 541, 553,

³ This is the distinction recognized by the Solicitor General in his brief in *Kent v. Dulles*, *infra*, when he noted that the petitioners there "did not challenge the constitutionality of the statutes themselves in their complaints" and that had they done so, "a problem as to convening a three-judge court district court would have arisen", *Kent v. Dulles*, O. T. 1957, No. 481 (Respondent's Brief, pp. 91-92, fn. 98). The distinction between *Rusk v. Cort*, 372 U. S. 144 (three-judge court) and *Kennedy v. Mendoza-Martinez*, 372 U. S. 144 is that in the latter case "the issues were framed so as not to contemplate any injunctive relief" (*Id.* at 153).

where a three-judge court heard a complaint that certain regulations "are not authorized by statute or that, if purporting to be so authorized, the statute violates the Federal Constitution". See also *Rusk v. Cort*, 372 U. S. 144,⁴ *Bauer v. Acheson*, 106 F. Supp. 445 (D.C. Cir. 1952). See also *Lee v. Bickell*, 292 U. S. 415, 417, 425; *Florida Lime Growers Inc. v. Jacobsen*, 362 U. S. 73, 77, 80-81, 85; *Sterling v. Constantin*, 287 U. S. 378, 393, 394.

Appellees' principal reliance is upon *William Jameson & Co. v. Morgenthau*, 307 U. S. 171. That case held that "no substantial question of constitutional validity was raised" with respect to the statute there involved (*id.* at 173).⁵ That cannot be said of the instant lawsuit in the light of this Court's recent decisions on freedom of movement, *infra*, page 5. It is this critical point that distinguishes the *William Jameson* case from the instant one.

The suggestion that an injunction in this case would "prohibit the issuance of any passport" by the Secretary is obviously incorrect (Motion, p. 6). An injunction against the Passport Act or § 215 would merely prevent their restriction of travel to particular areas⁶ and would not interfere in any way with the Secretary's inherent power to issue a passport. See *Bauer v. Acheson*, 106 F. Supp. 445 (D. C. Cir. 1952).

3. Appellees' suggestion that the judgment below "could be affirmed summarily" (Motion, p. 7) conflicts with this Court's recent decisions upholding the constitutional right to travel. *Kent v. Dulles*, 357 U. S. 16, 127; *Aptheker v. The Secretary of State*, Oct. Term 1963, No. 461, 32 L. W. 4611. This Court has never agreed with the view that the

⁴ See e.g. par. 19 of the complaint (p. 4 of the Transcript of Record) in the *Cort* case.

⁵ See *Worthy v. United States*, 328 F. 2d 386 (C. A. 5, 1964), as an example of the nullification as unconstitutional of another aspect of § 215.

liberty of the citizen may be manipulated as "an instrument of foreign policy" (Motion; p. 8). The cases cited by appellees do not involve such issues of personal liberty; the same authorities were disregarded by this Court when relied upon by the Government in the *Kent* and *Aptheker* cases.

In addition to the constitutionality of the statutes, this case presents substantial questions as to their construction, appellees' claim of inherent Executive power, and the viability of decade-old emergency proclamations. The treatment of these issues in the court below attests to their substantiality. In the light of their continuing importance and the diversity of views expressed below, it is desirable that an authoritative ruling be made by this Court.

Respectfully submitted,

LEONARD B. BOUDIN,
VICTOR RABINOWITZ,
30 East 42nd Street,
New York, N. Y. 10017,

SAMUEL GRUBER,
322 Main Street,
Stamford, Connecticut,

Attorneys for Appellant.

APPENDIX**Amended Complaint for Declaratory Judgment
and Injunction****UNITED STATES DISTRICT COURT****DISTRICT OF CONNECTICUT****Civil Action No. 9549**

LOUIS ZEMEL, Powder Hill Road, Middlefield, Connecticut,
Plaintiff,

v.

DEAN RUSK, Secretary of State, Department of State,
Washington, D. C. and **ROBERT F. KENNEDY**, Attorney
General, Washington, D. C.,
Defendants.

The plaintiff, Louis Zemel, by his attorneys, complaining of the defendants, Dean Rusk, Secretary of State, and Robert F. Kennedy, Attorney General, alleges as follows:

1. The Court has jurisdiction of this action under Section 10 of the Administrative Procedure Act, 5 U. S. C. Section 1009; and under Title 28 U. S. C. Sections 1391 and 2201. One of the purposes of this action is to enjoin the enforcement and execution of certain acts of Congress for repugnance to the Constitution. Hence, a three-judge Court is required to be convened under 28 U. S. C. Sections 2282 and 2284.

2. Plaintiff is a citizen of the United States, residing in Middlefield, Connecticut.

*Amended Complaint for Declaratory Judgment
and Injunction*

3. The defendant, Dean Rusk, is Secretary of State of the United States, and is charged by law with the duty of issuing passports in the United States.

4. The defendant, Robert F. Kennedy, is Attorney General of the United States and is charged by law with the duty of regulating departure from and entry into the United States.

5. Plaintiff is the holder of a valid United States passport of standard form and duration.

6. On January 16, 1961, the defendant Secretary of State announced publicly and formally ruled that United States passports are invalid for travel to Cuba unless such passports are specifically endorsed by him for such travel. The said announcement was made in Press Release No. 24 of the Department of State.

7. On January 16, 1961, the defendant Secretary of State, through his Deputy Under-Secretary for Administration, issued Public Notice 179, 26 F. R. 492 (January 19, 1961), which stated that "all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in Cuba" and "Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this order is revoked."

8. On January 16, 1961, the defendant Secretary of State issued Departmental Regulation 108.456, which was published on January 19, 1961 (26 F. R. 482-483), which amended 22 CFR 53.3(b), and which exempted Cuba from those countries in the Western Hemisphere for which a passport is not required of United States citizens by the defendant Secretary of State.

*Amended Complaint for Declaratory Judgment
and Injunction*

9. The said restrictions upon travel to Cuba are purportedly based upon the President's powers under (i) Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U. S. C. 1185 (ii), the Act of July 3, 1926, 44 Stat. 887, 22 U. S. C. 211a (iii), Sections 124 and 126 of Executive Order 7856, 3 F. R. 681, 687, 22 CFR 51.75, 51.77 and (iv) Proclamation 3004, 18 F. R. 489 issued on January 17, 1953, the said Proclamation being based upon the alleged existence of a national emergency arising principally from the Korean War. In addition, the defendant Secretary of State has claimed the existence of an "inherent executive power" to restrict and prevent such travel.

10. Upon information and belief, the defendant Secretary of State has publicly announced and privately advised individuals that criminal proceedings against United States citizens traveling to Cuba and not possessing the said endorsements in their passports would be instituted. In at least one such case, the defendant Attorney General recently instituted a criminal prosecution against an American citizen on the ground that his entry into the United States from Cuba without a passport validated as set forth above constitutes a violation of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U. S. C. 1185.

11. Upon information and belief, the restrictions and sanctions set forth in paragraphs "9" and "10" above have caused common carriers to refuse to carry United States citizens not bearing United States passports with the the special endorsement referred to in paragraph "7" above, and have caused foreign governments to refuse to permit the departure of American citizens from their territories for Cuba under similar circumstances.

*Amended Complaint for Declaratory Judgment
and Injunction*

12. On March 31, 1962 and thereafter, the plaintiff requested the defendant Secretary of State to validate his passport for travel to Cuba. Such requests were rejected by defendant on April 18, 1962 and thereafter.

13. On May 1, 1962, the plaintiff requested that the defendant Secretary of State give him a hearing in connection with the said defendant's refusal to validate plaintiff's passport for travel to Cuba. On May 9, 1962, the said defendant, citing 22 CFR 51.170 advised the plaintiff that the State Department's hearing procedures were not available in cases of this kind.

14. The actions of the defendants in this case are unlawful in that:

(a) The Passport Act of 1926, 44 Stat. 887, 22 U. S. C. 211a, does not authorize the defendants to prevent by denial of passport facilities or by threat of civil or criminal sanctions or otherwise, the travel of an American citizen to, or in any part of the world.

(b) Section 215 of the Immigration and Nationality Act of 1952, 8 U. S. C. 1185, does not authorize the defendants to prohibit the travel of United States citizens to or in countries specified by the said defendants or make illegal the departure from the United States to any country whatsoever of American citizens bearing valid passports.

(c) The denial of the right to travel is an interference with plaintiff's right as a citizen and resident of the United States to freedom of speech, belief and association under the First Amendment to the Constitution of the United States, and his right to travel under the Fifth, Ninth and Tenth Amendments, and is so arbitrary and unreasonable as to deny plaintiff due process under the Fifth Amendment.

*Amended Complaint for Declaratory Judgment
and Injunction*

(d) The Korean War which was the basis for Proclamation 3004 of January 17, 1953 terminated more than eight years ago. The said Proclamation is accordingly inoperative as a matter of law, and there is in fact no emergency existing at the present time which could rationally justify the exercise of controls by the defendants over the travel of American citizens to and from the Republic of Cuba.

15. The Passport Act of 1926, 44 Stat. 887, 22 U. S. C. 211a and Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U. S. C. 1185, are unconstitutional both on their face and as applied because (a) on their face, they interfere with plaintiff's rights as set forth in paragraph "14(c)"; and (b) they are construed and applied to prevent travel even in the absence of an actual emergency; and (c) they contain no standards and are therefore an invalid delegation of legislative power.

16. The defendant Secretary of State's regulations and announcements as set forth in paragraphs "6" through "8" above are invalid for the additional reason that Executive Order 7856 and Proclamation 3004 fail to contain any standards to guide the Secretary of State in promulgating the said regulations and to guide the American citizen in determining whether the regulations are supported by statute or proclamation.

17. The plaintiff has exhausted his administrative remedies.

18. The actions of the defendants in denying the plaintiff the passport facilities sought, in obstructing plaintiff's departure from the United States to Cuba, in interfering with his travel, and in threatening the imposition of crim-

*Amended Complaint for Declaratory Judgment
and Injunction*

inal and civil proceedings are causing plaintiff irreparable injury for which he has no adequate remedy at law.

WHEREFORE, plaintiff prays for a judgment.

(a) Decreeing that plaintiff is entitled under the Constitution and laws of the United States to travel to Cuba and to have his passport properly validated for that purpose;

(b) Decreeing that plaintiff's travel to Cuba and his use of the passport for that purpose will not constitute a violation of the passport laws of the United States, or of the Immigration and Nationality Act of 1952, or of the State Department's rules and regulations, or of the terms and conditions of his passport;

(c) Decreeing that the defendant Secretary of State's restrictions upon travel to Cuba, as embodied in his public announcement of January 16, 1961, Press Release No. 24, in Public Notice 179, 26 F. R. 492, and in Departmental Regulation 108.456, 26 F. R. 482-483, are invalid, without any authority in law, and are unsupported by the Passport Act of 1926, 44 Stat. 887, 22 U. S. C. 211a, or by Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U. S. C. 1185, or by Proclamation 3004, 18 F. R. 489.

(d) Decreeing that the Passport Act of 1926, *supra*, and Section 215 of the Immigration Act of 1952, *supra*, are unconstitutional, and enjoining the defendants from carrying out or enforcing the said statutes, as aforesaid.

(e) Decreeing that the defendant Secretary of State's refusal to afford passport facilities to plaintiff so that he may go to Cuba is in violation of plaintiff's rights under the statutes and Constitution of the United States and the Declaration of Human Rights of the United Nations.

*Amended Complaint for Declaratory Judgment
and Injunction*

(f) Decreeing that the denial of the said passport endorsement and validation to plaintiff without a formal hearing at which evidence is adduced to show how the national security would be affected adversely by plaintiff's proposed trip to Cuba, violates plaintiff's rights to due process under the Fifth Amendment to the Constitution;

(g) Directing the defendant Secretary of State to validate plaintiff's passport for travel to and from Cuba;

(h) Enjoining the defendants from interfering with plaintiff's travel to Cuba, and from taking any adverse action whatsoever against plaintiff by way of passport cancellation, denial of future passport facilities, institution of criminal proceedings, advice or instructions to other governments and to common carriers, or other actions against the plaintiff by reason of his prospective travel to Cuba and such travel when consummated.

(i) And for such other and further relief as may be just and proper.

* * *